

**BOARD OF APPEALS  
for  
MONTGOMERY COUNTY**

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**Case No. A-6601**

**APPEAL OF BARRY NAFT**

**OPINION OF THE BOARD**

(Hearing held April 17, 2019)  
(Effective Date of Opinion: May 14, 2019)

Case No. A-6601 is an administrative appeal filed December 13, 2018, by Dr. Barry Naft (the "Appellant"). The Appellant charged error on the part of Montgomery County's Department of Permitting Services ("DPS") with "collateral interest from the Department of Environmental Protection, Department of Transportation, & Department of Housing & Community Affairs" in "actions by the Department of Permitting Services (DPS) under Section 49-35 Right-of-way permits. This appeal involves stormwater management and erosion control actions by my neighbor, who is the Owner of a private single family residence at 10500 Stapleford Hall Dr. in Potomac, Md." See Exhibit 1.<sup>1</sup>

The subject property is Lot 2, Block B, Kentsdale Estates Subdivision, located at 10500 Stapleford Hall Drive, Potomac, Maryland, 20854 in the RE-2 zone (the "Property").

Pursuant to section 59-7.6.1.C of the Zoning Ordinance, the Board scheduled a public hearing for April 3, 2019. Prior to the hearing, the Board held a pre-hearing conference on February 13, 2019, the subject of which was pre-hearing submissions by the parties, pursuant to the Montgomery County Code, section 2A-7(a). Appellant appeared *pro se*. James and Alvina Leder (the "Intervenors"), who own the property at 10500 Stapleford Hall Drive, were represented by Casey L. Cirner of Miles & Stockbridge P.C. and were permitted to intervene in this administrative appeal. Associate County Attorney Charles L. Frederick represented Montgomery County.

At the outset of the pre-hearing conference, Mr. Frederick informed the Board that, pursuant to sections 2A-7 and 2A-8 of the County Code and Board Rule 3.2, he was filing a Motion to Dismiss. See Exhibit 6. The Board, exercising its authority to regulate the

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<sup>1</sup> Appellant filed an amendment to this appeal which contained the same allegations as his original appeal and referenced the attachments he had submitted with his original filing. See Exhibit 3. The amendment also contained some additional information, including the issued right-of-way permit. See Exhibit 3(b).

course of a hearing and in the interest of judicial efficiency, re-set the April 3, 2019 public hearing date to a motions hearing date<sup>2</sup> to consider the County's Motion to Dismiss, as well as any motions filed by Intervenor or Appellant, and re-scheduled the public hearing for April 17, 2019, should the motions hearing not dispose of the appeal. Intervenor filed a Motion to Dismiss on March 22, 2019. See Exhibit 9. On March 22, 2019, Appellant filed a copy of materials he intended to reference at the motions hearing. See Exhibit 8.

Decision of the Board: County's and Intervenor's Motions to Dismiss **granted**; administrative appeal **dismissed**.

### **RECITATION OF FACTS**

**The Board finds, based on undisputed evidence in the record, that:**

1. The Property, located at 10500 Stapleford Hall Drive, Potomac, Maryland, 20854, is in the RE-2 zone.
2. Appellant owns the property located at 10504 Stapleford Hall Drive, Potomac, Maryland, 20854, also in the RE-2 zone. See Exhibit 1.
3. Intervenor owns the property located at 10500 Stapleford Hall Drive. See Exhibit 5 and Exhibit 10, circle 13-14.
4. On October 31, 2018, Intervenor James Leder submitted an application to work in the public right-of-way with DPS. See Exhibit 10, circle 6-12. This application identified the location of work as at the Property. See Exhibit 10, circle 6-14.
5. On December 13, 2018, DPS issued a Right-of-Way Construction Permit, number 365855, to Intervenor James Leder to construct in the right of way at the Property. See Exhibit 10, circle 5. This Permit stated that the work would include "[e]xtending drywell over flow pipe into County ROW and to the existing open section of Stapleford Hall Drive swale."
6. Appellant did not apply for a right-of-way permit for the Property.

### **MOTION TO DISMISS — SUMMARY OF ARGUMENTS**

1. Counsel for the County<sup>3</sup> argued that this case concerns the issuance of a right-of-way permit to allow the overflow of a drain pipe on the Property into an existing drainage system. He argued that this appeal concerns the County's decision to issue a right-of-way permit to Intervenor.

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<sup>2</sup> Appellant was ill on April 3, 2019; therefore, the motions hearing was re-scheduled to April 17, 2019.

<sup>3</sup> Counsel for the County, Mr. Frederick, was unable to attend the hearing on April 17, 2019, so Associate County Attorney Robert Birenbaum appeared on behalf of the County.

Counsel for the County argued that this appeal must be dismissed because the Board does not have jurisdiction over this appeal. He argued that the Board is governed by and constrained by statute, and cannot hear any matter not authorized by statute. He argued that the County Code, section 2-112, sets forth most of the matters the Board can hear on appeal. Counsel argued that, while section 2-112 does enable the Board to hear appeals under section 49-35 of the County Code, which governs right-of-way permits, section 49-35(h) states that “[a]n aggrieved person may file an appeal with the County Board of Appeals from a denial, suspension, or revocation of a permit issued under this Section...” He argued that the Board’s jurisdiction under this section is not plenary and is limited to hear appeals on the denial, suspension, or revocation of a right-of-way permit, not the issuance of a right-of-way permit.

Counsel for the County argued that section 49-35(h) must be construed using the plain and ordinary terms without adding or taking any terms away. He argued that there is no way to construe the statute to allow the Board to hear an appeal on the issuance of a right-of-way permit. Counsel argued that the County Council would have expressly stated that an aggrieved party could appeal the issuance of a right-of-way permit if the Council had meant to allow such an appellate right, which the Council has done in other portions of the County Code.

Counsel for the County argued that Appellant makes further allegations about non-compliance with sediment controls and environmental controls under Chapter 19 of the County Code. He argued that the Board also does not have jurisdiction over these allegations. Counsel argued Appellant’s assertion that DPS is required to review and approve a storm drain system before DPS can approve a right-of-way permit is incorrect. Counsel argued that a sediment control permit was not required in this case because the land disturbed was less than 5,000 square feet. He argued that even if a sediment control permit was required, section 49-35(a)(4) states that “[i]f the proposed activity requires a sediment control permit, the Department must issue the permit before any activity occurs...” and that therefore the sediment control permit must be issued before any activity occurs, not before the right-of-way permit is issued.

Counsel argued that just because Appellant feels he has a case on the merits does not mean the Board has jurisdiction to hear his appeal. He argued the Board cannot expand jurisdiction to persons who are not aggrieved persons in the denial, suspension or revocation of a right-of-way permit.

2. Counsel for Intervenor argued that this case involves the replacement of a failed drainage system and installation of an overflow drain pipe on the Property’s right-of-way. She argued that Intervenor support and adopt the County’s argument that the Board only has jurisdiction to hear an appeal from the denial, suspension, or revocation of a right-of-way permit. Counsel argued that this interpretation is supported by Maryland law of statutory interpretation, and that it is clear an appeal is limited to the denial, suspension, or revocation of a permit. She argued that the word “issuance” is not included in section 49-35(h). Counsel argued that to read the statute any other way would require adding the word “issuance.”

Counsel for Intervenor argued that Appellant's allegation that the drainage system is not compliant with Chapter 19 and required the issuance of a sediment control permit is erroneous for two reasons. First, Counsel argued that the Board lacks jurisdiction to hear appeals concerning Article 1 (erosion and sediment control management) and Article 2 (stormwater water management) of Chapter 19 of the County Code. She argued that both Articles are reviewed by DPS and do not contain a right to appeal DPS's review to the Board. She argued that the only appellate review to the Board under Chapter 19 is found in section 19-69, which enables the Board to review action taken by the Department of Environment Protection ("DEP") to intervene after DPS issues any permit or other approval under Chapter 19. Counsel argued that other than this limited appellate right, the Board does not have jurisdiction to review non-compliance with Chapter 19.

Counsel for Intervenor argued that the second reason Appellant's allegations are incorrect is that section 49-35(a)(4) of the County Code states that DPS must issue a sediment control permit before any activity occurs. She argued that the issuance of sediment control permit may be a condition to any work being done but that it is not required prior to the issuance of a right-of-way permit.

Counsel for Intervenor argued that an Editor's Note to section 2-112 of the County Code has nothing to do with appeal rights to the Board. She argued that the appeal rights for a right-of-way permit were added to the Code in 1993 with an effective date of 1994 through Bill 6-93, and that these appeal rights have not changed; they have always been limited to a denial, suspension, or revocation of a right-of-way permit. See Exhibit 13. Counsel argued that Bill 41-12, provided in Appellant's materials, changed the name of a right-of-way permit, which is why the bill also made changes to section 2-112 of the County Code. See Exhibit 12.

3. Appellant argued he is a registered Professional Engineer with over 50 years of experience in environmental projects. He argued that he has standing to appeal this case under section 2-112 of the County Code, and that the statutory intent clearly allows this appeal.

Appellant argued that this appeal concerns the protection of road trees. He argued that the principle purpose and intent of section 49-35 of the County Code is to protect road trees. Appellant argued that the photographs he submitted show the road trees involved, and that the storm water system Intervenor installed sends water toward these road trees. See Exhibit 8, number 24-26.

Appellant argued that the County Council made changes to the County Code in 2014 under Bill 41-12 with the specific intent to protect road trees. See Exhibit 8, number 27-38.<sup>4</sup> He argued that Montgomery County is the only county in Maryland that has protection for road trees.

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<sup>4</sup> Counsel for Intervenor objected to Appellant's testimony about the changes to the County Code outlined in Bill 41-12 because the version of the bill submitted by Appellant did not show the amendments to the Code; it only showed the final version of the Code. See Exhibit 8, number 27-38. Counsel submitted copies of Bill 41-12

Appellant argued that the argument that Chapter 49 only authorizes the Board to hear appeals for the denial, suspension, or revocation of a right-of-way permit is incorrect. He argued that section 49-36(j) of the County Code enables an aggrieved person to file an appeal with the Board from the issuance of a stop-work order or additional conditions added to permits. Appellant argued in this case he is appealing additional conditions on the right-of-way permit.<sup>5</sup>

Appellant argued that he is an aggrieved person in this case because he is a neighbor of Intervenor and their actions taken under the right-of-way permit affect him. He argued that there is an Editor's Note under section 2-112 of the County Code which states "2013 L.M.C., ch. 22, § 2, states: Effective Date. This Act takes effect on March 1, 2014, and applies to any permit applied for under chapter 8, Chapter 19, or Section 49-35 on or after that date" and that this note supports his assertion that the Board has jurisdiction to hear his appeal under section 49-35.

Appellant argued that if he is not permitted to go forward to a hearing on the merits of his appeal the trees will be destroyed. He argued that there is no downside to allowing him to present his case on the merits and that the Board should be open to hearing cases.

### **CONCLUSIONS OF LAW**

1. Section 2-112(c) of the Montgomery County Code states "[t]he Board has the following appellate jurisdiction" over appeals taken under specified sections and chapters of the Montgomery County Code, including section 49-35. Section 2-112(d) states that "[t]he Board must hear and decide any other appeal authorized by law."

2. Section 2A-2(d) of the Montgomery County Code provides that the provisions in Chapter 2A govern appeals and petitions charging error in the grant or denial of any permit or license or from any order of any department or agency of the County government, exclusive of variances and special exceptions, appealable to the County Board of Appeals, as set forth in Section 2-112, Article V, Chapter 2, as amended, or the Montgomery County Zoning Ordinance or any other law, ordinance or regulation providing for an appeal to said board from an adverse governmental action.

3. Under Section 2A-8 of the Montgomery County Code, the Board has the authority to rule upon motions and to regulate the course of the hearing. Pursuant to that section, it is customary for the Board to dispose of outstanding preliminary motions at a motions hearing prior to the hearing. Board Rule 3.2 specifically confers on the Board the ability to grant Motions to Dismiss for Lack of Jurisdiction in cases where the Board lacks jurisdiction and Motions to Dismiss for Summary Disposition in cases where there is no genuine issue of material fact and dismissal should be rendered as a matter of law (Rule 3.2.2).

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outlining the changes to the Code, which the Board accepted into the record. See Exhibit 12.

<sup>5</sup> The Board noted that sections 49-36(i) and (j) apply to stop-work orders issued to a permittee by the Director of DPS and do not apply to this case.

4. Section 49-35 of the County Code provides:

**Sec. 49-35. Right-of-way permit.**

(a) (1) A person must not construct any road, sidewalk, shared use path, curb and gutter, driveway, or drainage structure; begin any such construction (including clearing, grading, and tree cutting); or perform any tree work on any roadside tree (including removing a stump on a County right-of-way), without a permit from the Director of Permitting Services. Any permit issued for roadside tree work must comply with Section 49-36A. In this Article, "roadside tree" means any plant that has a woody stem or trunk which grows all, or in part, in the right-of-way of any County public road.

(2) In this Section and Sections 49-36, 49-36A, and 49-37, unless otherwise specified, Director refers to the Director of Permitting Services and Department refers to the Department of Permitting Services.

(3) A person must apply for a permit on forms prescribed by the Director, submit detailed plans and specifications, and include locations and record plats approved by the Department and the Planning Board.

(4) If the proposed activity requires a sediment control permit, the Department must issue the permit before any activity occurs under a permit issued under this subsection. The State Highway Administration must approve any action under its jurisdiction before the Director may approve the permit.

(5) As a requirement to issue a permit under this Section, the Director may require the applicant to designate and bond a haul route for construction materials, as described in Section 49-8.

(b) The Director must collect a fee, set by Method 3 regulation, for each right-of-way permit application. However, the Director must not collect a fee for any permit to:

- (1) remove a tree that endangers a person or property;
- (2) remove a stump in the right-of-way; or
- (3) install a sign identifying a geographic area in the right-of-way if:

(A) the primary applicant is an unincorporated or non-profit civic or homeowners' organization that is either:

(i) listed on the Planning Board's most recent list of civic and homeowners associations; or

(ii) exempt from federal income taxes and shows that its annual revenue during its most recent fiscal year did not exceed an amount set by a regulation;

(B) in a homeowners' association, maintenance responsibility of all common areas has been transferred from the developer; and

(C) the proposed sign would be smaller than a maximum size set by regulation.

(c) Before an applicant begins any road, sidewalk, curb and gutter, driveway, retaining wall, steps, or drainage project, on a road or within the boundaries of a dedication to public use, the applicant for a permit to undertake any such project must pay to the County an inspection and engineering fee set by the County Executive by method (3) regulation.

(d) If any such project is solely a grading project, the applicant must pay an inspection and engineering fee to the County if Department staff does the engineering work on the project and an inspection fee if the applicant submits the engineering work.

(e) Any violation of this Section is a Class A violation.

(f) The Director must refund half the fees required by this Section to the applicant if a permit is rejected or withdrawn before construction begins. If an applicant proposes to undertake a project using materials, standards, or specifications superior to those required under this Article, the fees charged must be computed on the estimated cost of the project as if it met those requirements.

(g) A person, including any utility corporation, must not cut a road to install or connect any underground gas, electric power, or telephone line, or any other underground infrastructure, without a permit from the Director. The Director must supervise all backfilling and repaving of utility trenches to assure that the permittee complies with all applicable specifications.

(h) An aggrieved person may file an appeal with the County Board of Appeals from a denial, suspension, or revocation of a permit issued under this Section within 10 days of the denial, suspension, or revocation.

5. Section 49-36 of the County Code, which governs permit conditions and procedures, sections (i) and (j) state:

(i) If the Director finds that a person has violated the conditions of any permit, the Director may order the permittee to stop construction and may revoke the permit. The refusal of any permittee to stop construction after receiving notice of a stop-work order is a separate violation of this Article.

(j) An aggrieved person may file an appeal with the County Board of Appeals from the issuance of a stop-work order or the imposition of additional conditions under this Section. The appeal must be filed with the Board within 10 days after the stop-work order is issued or the additional conditions are imposed.

6. Section 19-69 of the County Code, which governs the authority of DEP, states that "[t]he Director of Environmental Protection may, within 5 working days after the Department of Permitting Services issues any permit or other approval under this Chapter, suspend, revoke, or modify that permit or approval if the DEP Director finds that the issuance of the permit or approval did not protect the water resources of the County to the extent required by this Chapter or otherwise did not comply with this Chapter. The recipient of any permit or other approval under this Chapter must not take any action allowed by the permit or approval during that 5-day period. Any person aggrieved by an action of the DEP Director under this Section may appeal that action to the Board of Appeals within 30 days after the action is taken. A decision by the DEP Director not to suspend, revoke, or modify a permit or approval under this Section is not appealable, and must not be considered in any later appeal of the issuance of a permit or other approval or in any other proceeding."

7. The Board finds that the motions to dismiss should be granted because the Board does not have jurisdiction over DPS's issuance of a right-of-way permit under

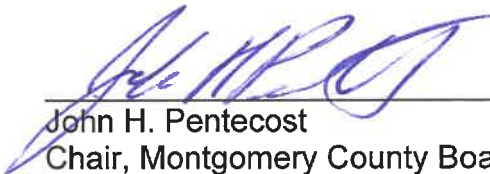
section 49-35 of the County Code or over allegations of noncompliance with Articles I and II of Chapter 19 of the County Code. The Board finds that the Board's jurisdiction is delineated in the County Code, and that the Board's jurisdiction does not include jurisdiction to hear administrative appeals concerning the issuance of a right-of-way permit or over allegations of noncompliance with erosion and sediment control management or storm water management. The Board finds that the County Code, and specifically section 2-112(c), section 49-35, and Chapter 19, do not provide the Board with jurisdiction, and thus the Board lacks jurisdiction.

The Board finds that any controversy does not involve any genuine issue of material fact to be resolved. There is no dispute that Appellant does not own the Property. There is no dispute that Appellant did not apply for a right-of-way permit for the Property or that Appellant was not aggrieved in the denial, suspension, or revocation of Right-of-Way Construction Permit, number 365855. The Board finds that because the Appellant is not an aggrieved person in the denial, suspension, or revocation of a right-of-way permit on the Property, the Appellant cannot appeal the issuance of a right-of-way permit to Intervenor on the Property. The Board further finds that DPS can issue a right-of-way permit prior to the issuance of any sediment control permit under section 49-35(a)(4) of the County Code.

8. The Motions to Dismiss in Case A-6601 are granted, and the appeal in Case A-6601 is consequently **DISMISSED**.

On a motion by Chair John H. Pentecost, seconded by Vice Chair Stanley B. Boyd, with Members Bruce Goldensohn, Katherine Freeman, and Jon W. Cook in agreement, the Board voted 5 to 0 to dismiss the administrative appeal.

**BE IT RESOLVED** by the Board of Appeals for Montgomery County, Maryland that the opinion stated above be adopted as the Resolution required by law as its decision on the above entitled petition.

  
John H. Pentecost  
Chair, Montgomery County Board of Appeals

Entered in the Opinion Book  
of the Board of Appeals for  
Montgomery County, Maryland  
this 14th day of May, 2019.

  
Barbara Jay  
Executive Director



NOTE:

Any request for rehearing or reconsideration must be filed within ten (10) days after the date the Opinion is mailed and entered in the Opinion Book (see Section 2A-10(f) of the County Code).

Any decision by the County Board of Appeals may, within thirty (30) days after the decision is rendered, be appealed by any person aggrieved by the decision of the Board and a party to the proceeding before it, to the Circuit Court for Montgomery County in accordance with the Maryland Rules of Procedure (see Section 2-114 of the County Code).

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